

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:SF:POSTU-102752-02
MTRobus

date: May 20, 2002

to:

Revenue Agent, LMSB [REDACTED]
Internal Revenue Service
[REDACTED]

from: Area Counsel
(Communications, Technology, and Media: Oakland)

subject: [REDACTED], Inc. (EIN: [REDACTED]) and Subsidiaries
FYE: [REDACTED], [REDACTED], [REDACTED] and [REDACTED] and Carryback Years
[REDACTED] and [REDACTED]

U.I.L. #: 1502.77-00
Common Parent Agent for Subsidiaries
U.I.L. # 6212.02-04
Notice of Deficiency - Last Known Address

Modifications to Non-docketed Significant Advice Request

Disclosure Statement

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Our National Office has recommended the following modifications to our advice memo to you dated May 1, 2002:

Who is the Taxpayer?

In addition to Treas. Reg. § 1.1502-77(a), the memo should also have cited to Treas. Reg. § 1.1502-77T(a)(4)(i), the alternative agent regulation. This section applies because [REDACTED] is no longer the common parent. The old common parent is the alternative agent the Service can deal with, and that is [REDACTED]. The Service should only have been dealing with the

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common parent and never with [REDACTED], unless [REDACTED] had a POA from [REDACTED], which the facts do not indicate.

Also, when presenting the Form 872 for execution, you should orally advise the taxpayer of their right to refuse to extend the statute of limitations on assessment. I.R.C. § 6501(c)(4)(B). The following statement may be included at the bottom of the Form 872:

In executing this Form 872, taxpayer acknowledges that it has been advised by Exam of its right to refuse to consent to an extension of the statute of limitations or to limit such an extension to specific issues or to a specific time frame, pursuant to I.R.C. § 6501(c)(4)(B).

Where should the notice of deficiency be mailed?

A Power of Attorney Form 2848 can provide the Service with a new last known address if it authorizes that original communications are to be sent to the authorized representative. That address would then constitute the taxpayer's last known address under I.R.C. § 6212(b)(1). See *Honts v. Commissioner*, T.C. Memo. 1995-532. Form 2848 (Rev. 1-2002) and Form 2848 (Rev. 12-97), provide that original notices will be sent to the taxpayer, unless otherwise provided for on Line 7 of the POA.

Please call me at (415) 744-9217 if you have any questions.

LAUREL M. ROBINSON
Associate Area Counsel

By: _____
MARION T. ROBUS
Attorney (LMSB)

cc: [REDACTED]
Team Manager, Exam Group [REDACTED]
[REDACTED]

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:SF:POSTU-102752-02
MTRobus

date: May 1, 2002

to:

Revenue Agent, LMSB [REDACTED]
Internal Revenue Service
[REDACTED]

from: Area Counsel
(Communications, Technology, and Media: Oakland)

subject: [REDACTED], Inc. (EIN: [REDACTED]) and Subsidiaries
FYE: [REDACTED], [REDACTED], [REDACTED] and [REDACTED] and Carryback Years
[REDACTED] and [REDACTED]

U.I.L. #: 1502.77-00
Common Parent Agent for Subsidiaries
U.I.L. # 6212.02-04
Notice of Deficiency - Last Known Address

Non-docketed Significant Advice Request ("NSAR")

Disclosure Statement

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This advice is in response to your memorandum dated March 25, 2002, and relies on facts provided by you to our office. If you find that any facts are incorrect, please advise us immediately so that we may modify and correct this advice. This advice is subject to 10-day post-review by the National Office. CCDM 35.3.19.4. Accordingly, we request that you do not act on this advice until we have advised you of the National Office's comments, if any, concerning this advice.

ISSUE

Who is the taxpayer for purposes of correspondence with the taxpayer, issuance of a thirty-day letter and issuance of a ninety-day letter (notice of deficiency)?

CONCLUSION

The taxpayer is [REDACTED] Inc. (EIN: [REDACTED]) and Subsidiaries (hereinafter "[REDACTED]" and "Taxpayer"). Correspondence, including issuance of a thirty-day letter and a ninety-day letter, should be mailed to the Taxpayer at [REDACTED]. A duplicate notice of deficiency should be sent to the Taxpayer at [REDACTED].

DISCUSSION OF FACTS AND LAW**Facts**

[REDACTED] Inc. and Subsidiaries ("Taxpayer") filed consolidated Forms 1120 "U.S. Corporation Income Tax Return" for the above periods. During that time, [REDACTED] Inc. ("[REDACTED]") was an independent, publicly-traded corporation. On [REDACTED], [REDACTED] was sold to [REDACTED] Inc. ("[REDACTED]"), becoming a wholly-owned subsidiary of [REDACTED]. The return for the short period beginning [REDACTED] and ending [REDACTED] ("[REDACTED]"), is the final return for the consolidated group for which [REDACTED] was the common parent. The address shown on that return is [REDACTED].

On [REDACTED], [REDACTED] was merged with and into [REDACTED] Inc. ("[REDACTED]") and [REDACTED] became a wholly-owned subsidiary of [REDACTED]. Pursuant to a Sales and Purchase Agreement ("sales agreement") originally dated as of [REDACTED] as amended by Amendments No. 1 (dated as of [REDACTED]) and 2 (dated [REDACTED]), [REDACTED] sold all of its [REDACTED] business, including its subsidiary [REDACTED] to a privately-held company called [REDACTED] LLC ("[REDACTED]"). [REDACTED] became a wholly-owned subsidiary of [REDACTED]. The sales agreement shows two addresses for [REDACTED], the first in [REDACTED] and the second in [REDACTED].

The sales agreement provided in Article [REDACTED] which is entitled "Tax Matters," that [REDACTED] would be responsible for the activities relating to the audit of the tax returns of [REDACTED] and its subsidiaries for periods prior to [REDACTED].

In accordance with that tax matters provision, Revenue Agent [REDACTED] ("agent") has been dealing with the Vice President, Tax, of [REDACTED] with respect to [REDACTED] and the years at issue. When the individual occupying that position left [REDACTED] in [REDACTED] however, a new power of attorney ("POA") designation was not immediately provided to the agent.

On [REDACTED], a document entitled "[REDACTED]" ("resolution") was executed by [REDACTED] as "Its Director," appointing [REDACTED] as president of the corporation, [REDACTED] as secretary and [REDACTED] as chief financial officer with "...each to hold office until his or her successor has been elected and qualified." On [REDACTED], that resolution was sent to the agent by the Vice President, Tax, [REDACTED], along with an executed Form 872, "Consent to Extend the Time to Assess Tax" ("consent") which was signed by [REDACTED] as Secretary of [REDACTED], on [REDACTED]. The consent extended the time to assess tax for the [REDACTED] through [REDACTED] tax years until [REDACTED]. The address shown on the consent for [REDACTED] is the address for [REDACTED], which address was typed in by the agent.

According to an article on the [REDACTED] web site dated [REDACTED], a company by the name of [REDACTED] which is headquartered in [REDACTED], with a United States office in [REDACTED], purchased the [REDACTED] assets of [REDACTED] including [REDACTED] name, from [REDACTED]. That article also stated that [REDACTED] remained with [REDACTED].

Some time in [REDACTED] the agent received an AIMS ("Audit Information Management System") Weekly Update Report reporting an address change for [REDACTED] to the same address as that for [REDACTED] in [REDACTED]. Up to that time, the agent had not had any direct contact with [REDACTED] since he had been working with the [REDACTED] representative. The agent was aware, however, that [REDACTED] had a local office in [REDACTED]. In [REDACTED] the agent, not having received a new POA from [REDACTED] called the [REDACTED] office of [REDACTED] and spoke to someone who identified himself as the [REDACTED] controller. The information given to the agent was that the office in [REDACTED] is that of [REDACTED] LLC with a different EIN than the EIN shown for [REDACTED] on Internal Revenue Service records. Further, the [REDACTED] contact was unaware of any filing that would have generated the AIMS update.

On [REDACTED] the agent discovered that the AIMS update report was generated by [REDACTED] filing a Form 1120 in [REDACTED] for the year ending [REDACTED] using the

same EIN as on the earlier returns. Pursuant to discussions with this office, the agent sent a letter on or about [REDACTED] to [REDACTED] at the [REDACTED] address attaching copies of Notices of Proposed Adjustments ("NPAs") and other information that he had previously given to [REDACTED]. The agent also included a new Information Document Request ("IDR") requesting information on any corporate or organizational changes, such as sales of stock or assets, that have occurred since [REDACTED] was purchased by [REDACTED].

On [REDACTED] the agent received a new POA on behalf of [REDACTED] with respect to its income taxes for the years ended December 31, [REDACTED] through [REDACTED]. The POA designates [REDACTED] of [REDACTED] as [REDACTED]'s authorized representative. The POA was signed on [REDACTED] by [REDACTED], as corporate secretary of [REDACTED]. The POA lists the name and address of the Taxpayer as follows: [REDACTED] Inc., [REDACTED]. The EIN shown on the POA is the same as the one shown on the [REDACTED] tax returns, i.e., [REDACTED].

Law

Who is the Taxpayer?

The Taxpayer is [REDACTED] Inc. (EIN: [REDACTED]) and Subsidiaries. [REDACTED] was the common parent of the consolidated group for the years at issue, and, because it is still in existence, it is the proper party to extend the limitations period on assessment and to receive the notice of deficiency, and any other notices and correspondence, for the group's [REDACTED], [REDACTED], [REDACTED] and [REDACTED] years and carryback years [REDACTED] and [REDACTED]. Treas. Reg. § 1.1502-77(a) and (d). See also *Craigie, Inc. v. Commissioner*, 84 T.C. 466 (1985). This is so even though [REDACTED] is no longer the common parent.

You should identify the Taxpayer on the consent form as follows:

[REDACTED] Inc. (EIN: [REDACTED]) and
Subsidiaries consolidated group*

Put an asterisk at the bottom of the consent form followed by --

*This is with respect to [REDACTED], Inc. and subsidiaries consolidated group for the taxable years ending December 31, [REDACTED], December 31, [REDACTED], December 31, [REDACTED] and August 31, [REDACTED].

The notice of deficiency issued to [REDACTED] should include the names of all members of the group during any portion of the group's [REDACTED], [REDACTED], [REDACTED] and [REDACTED] years and carryback years [REDACTED] and [REDACTED]. See Treas. Reg. § 1.1502-77(a).

Although the sales agreement between [REDACTED] and [REDACTED] provides that [REDACTED] would be responsible for the audit activities, that agreement does not in any way bind the Internal Revenue Service. See *United States v. Elam*, 95-2 USTC ¶ 50,348 (1995) (holding that the Government is not bound by private agreements). A power of attorney authorizing [REDACTED] to act on its behalf is required from [REDACTED].

Where should the notice of deficiency be mailed?

Pursuant to I.R.C. § 6212(a), the Internal Revenue Service is authorized to send a notice of deficiency by certified or registered mail. The notice is deemed sufficient if it is mailed to the taxpayer at its last known address. I.R.C. § 6212(b)(1). Under these rules, a notice is deemed valid, whether or not the taxpayer receives it, if it is mailed by certified or registered mail to the taxpayer's last known address. See *Wilson v. Commissioner*, 564 F.2d 1317 (9th Cir. 1977); *Alta Sierra Vista, Inc. v. Commissioner*, 62 T.C. 367 (1974), *aff'd without published opinion*, 538 F.2d 334 (9th Cir. 1976).

In general, a taxpayer's last known address is the address shown on the most recently filed return, absent clear and concise notice of a change in address. See *King v. Commissioner*, 857 F.2d 676, 679 (9th Cir. 1988), *aff'g* 88 T.C. 1040 (1987); *Abeles v. Commissioner*, 91 T.C. 1019 (1988).

In this case, the Internal Revenue Service has received [REDACTED] address information from the following two sources: (1) the tax return filed by [REDACTED] in [REDACTED]; and, (2) the POA signed by the [REDACTED] Secretary on [REDACTED] and received by the Internal Revenue Service on [REDACTED]. In view of the two addresses, a question arises as to which of these addresses should be used.

According to Rev. Proc. 90-18, 1990-1 C.B. 491, in order to effectively change an address on the Internal Revenue Service's records from the address of a taxpayer's most recently filed return to a different address, the taxpayer must give the Service clear and concise written notification of the change of address. Rev. Proc. 90-18 provides that a clear and concise written notification of a change of address consists of a statement signed by the taxpayer informing the Service that the taxpayer

wishes the address of record changed to a new address. The taxpayer must also provide identifying information.

The Internal Revenue Manual (IRM) section 4.4.7.9.2 states that unless a new address is received according to Rev. Proc. 90-18, no change will be made to the Master File. However, although the revenue procedure provides guidance to Internal Revenue Service employees, it is not the final word on the matter of what is a last known address for purposes of the notice of deficiency. For example, in the case of *Westphal v. Commissioner*, T.C. Memo. 1992-599, the Tax Court stated that Rev. Proc. 90-18 did not limit the case law precedent established by the Tax Court or in any Circuit Court of Appeals, regarding the effectiveness of oral notice of a change of address. According to the court in *Westphal*, "the Commissioner's rulings are not binding precedent in this Court." (Citations omitted.)

In the earlier case of *Johnson v. Commissioner*, 611 F.2d 1015 (5th Cir. 1980), the Court of Appeals held that the Internal Revenue Service did not use due diligence in determining the correct address of the taxpayer when the Service failed to send the notice of deficiency to an address shown on a POA form provided to the Service by the taxpayer. The Court noted that the notice was sent to the taxpayer's residence, even though a power of attorney had been used several times by the I.R.S.

The IRM cited above at 4.4.7.9.2 goes on to state that if there is any doubt as to what constitutes the last known address of the taxpayer, a duplicate original notice of deficiency should be prepared to each known address.

In this case we have a POA, recently signed by [REDACTED] who was designated an officer of [REDACTED] in the Board of Directors' resolution. Under Treas. Reg. § 1.6062-1(c), [REDACTED]'s signature is prima facie evidence that he is authorized to sign such POA on behalf of [REDACTED]. That POA purportedly reflects a current address for [REDACTED]. Hence, we recommend that you use the address on the POA for purposes of sending correspondence and/or notices to the Taxpayer. However, because you were unable to confirm the address for [REDACTED] with [REDACTED] personnel at that address, we also recommend that for purposes of the notice of deficiency, that you send a duplicate notice to the Taxpayer's address as shown on its last return filed with the Internal Revenue Service.

Finally, we recommend that you send a letter to [REDACTED], Secretary of [REDACTED], enclosing a copy of Rev. Rul. 90-18, and requesting that [REDACTED] advise you, in accordance with the provisions of the Rev. Proc. 90-18, what the correct

address is for [REDACTED] [REDACTED]'s compliance with the revenue procedure will eliminate any question about the correct address for [REDACTED]

Please call me at (415) 744-9217 if you have any questions.

LAUREL M. ROBINSON
Associate Area Counsel

By: /s/
MARION T. ROBUS
Attorney (LMSB)

cc: Office of Chief Counsel (via email)
Internal Revenue Service
1111 Constitution Ave., N.W.
Room 4510
Washington, D.C. 20224

Linda Burke (via email)
Division Counsel

James Clark (via email)
Area Counsel, Oakland

[REDACTED]
Team Manager, Exam Group [REDACTED]
[REDACTED]